IN THE COURT OF APPEAL [1997] QCA 207

SUPREME COURT OF QUEENSLAND

C.A. No. 128 of 1997

Brisbane

[Jenvey v. Cook]

MARK JENVEY

v.

KAREN MAREE COOK

Appellant

Fitzgerald P.
McPherson J.A.
Helman J.

Judgment delivered 22 July 1997

Separate reasons for judgment of each member of the Court, Fitzgerald P. and McPherson J.A. concurring as to the reasons and order of Helman J.

APPEAL ALLOWED. CONVICTION OF OFFENCE UNDER S.9 *DRUGS MISUSE ACT* 1986 SET ASIDE. FINE OF $600.00 AND SENTENCE OF IMPRISONMENT FOR TWENTY DAYS IN DEFAULT OF PAYMENT OF FINE SET ASIDE. SUBSTITUTE A FINE OF $300.00 AND A SENTENCE OF IMPRISONMENT FOR TEN DAYS IN DEFAULT OF PAYMENT OF FINE FOR OFFENCE UNDER S.10 OF THE *DRUGS MISUSE ACT* 1986. FOUR MONTHS PERMITTED FOR PAYMENT OF THE FINE.

CATCHWORDS:CRIMINAL LAW - DRUGS - Appellant convicted of possession of a dangerous drug s.9 *Drugs Misuse Act* 1986 - cannabis sativa found on premises occupied by appellant and another - whether s.57(c) *Drugs Misuse Act* 1986 applies when another person has actual possession of a drug and accused has no actual knowledge of it.

***R v. Nguyen and Truong* [1995] 2 Qd.R. 285**
***R v. Clare* [1994] 2 Qd.R. 619**
***R v. Sargent* [1994] 1 Qd.R. 655**
***Symes v. Lawler* [1995] 1 Qd.R. 226**
***Lawler v. Prideaux* [1995] 1 Qd.R. 186**

Counsel: Mr S. Hamlyn-Harris for the appellant.
Mr R. Martin for the respondent.

Solicitors: Legal Aid Office (Qld) for the appellant.
Queensland Director of Public Prosecutions for the respondent.

Hearing Date: 24 June 1997

REASONS FOR JUDGMENT - FITZGERALD P.

Judgment delivered 22 July 1997

The circumstances giving rise to this appeal are set out in the reasons for judgment of Helman J.

It is possible that the appellant pleaded guilty to the second offence, that on 13 December 1996 she unlawfully had in her possession a thing, a cigarette rolling machine, that she had used in connection with the smoking of a dangerous drug, because she had been found guilty of the offence the subject of this appeal. Further, it is not clear to me why her possession of a cigarette rolling machine was unlawful. However, this appeal does not relate to that conviction.

I agree that the appeal against the appellant's conviction for unlawful possession of cannabis sativa should be allowed for the reasons stated by Helman J. and with the orders proposed by his Honour.

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 22 July 1997

For the reasons (with which I agree) of Helman J., the appeal should be allowed to the extent proposed by his Honour in those reasons.

REASONS FOR JUDGMENT - HELMAN J.

Judgment delivered 22 July 1997

On 14 March 1997 the appellant came before the Magistrates Court at Proserpine charged under s.9 of the *Drugs Misuse Act* 1986, which is in Part 2 of that Act, with unlawfully having possession of a dangerous drug: it was alleged that on 13 December 1996 at Cannonvale, Queensland she unlawfully had possession of the dangerous drug cannabis sativa. The appellant pleaded not guilty. Having heard the evidence of the complainant, Constable Jenvey, Detective Sergeant Marc Whitehouse, and the appellant's witness Neil Boland, his Worship found the appellant guilty. She then pleaded guilty to another offence, this one alleged under s.10 of the *Drugs Misuse Act*: that on 13 December 1996 at Cannonvale she unlawfully had in her possession a thing, a cigarette rolling machine, that she had used in connexion with the smoking of a dangerous drug. Convictions were not recorded. One fine of $600.00 was imposed for the two offences.

The appellant appeals against her conviction of the offence to which she pleaded not guilty on the following grounds:

"1.The verdict of the learned Magistrate was against the evidence and the weight of the evidence.

2.The verdict of the learned Magistrate was unsafe and unsatisfactory.

3.The learned Magistrate erred in directing himself that Section 57(c) of the Drugs Misuse Act related to any Cannabis Sativa and not specifically to the Cannabis Sativa found on the Appellant's premises and being the subject of the charge."

The charge arose out of the execution of a search warrant on the morning of 13 December 1996 on a flat at 34 Coral Esplanade, Cannonvale by the complainant, Whitehouse, and another police officer called Kirkpatrick. The appellant answered the door. Boland was found in a double bed in the main bedroom which the appellant was to admit she shared with Boland. A short time later, in the kitchen, the appellant and Boland were asked if they had any dangerous drugs to declare before the search began. Boland replied, "Yes, in the bedroom". He walked to the bedroom where he showed the police officers a clipseal plastic bag containing

cannabis sativa, which was the subject of the charge against the appellant. The bag was clearly visible on one of two bedside tables with drawers at the head of the bed.

In his evidence Boland said that the cannabis was his "personal smoke", that he had intended going out to play golf that day, and that he intended taking the cannabis with him because after a game of golf he sometimes had a "social smoke". He said that on that morning he had taken the cannabis out of the top drawer of the bedside table on his side of the bed where he had kept it. He placed it on top of the table with his car keys, his watch and some change. The drawer had no lock, but it was, he said, for his private use, as other drawers were for the appellant's private use. He said that the appellant had left the bedroom before he placed the cannabis on top of the bedside table and she had not returned to the bedroom before the police officers arrived. He said he had had possession of the cannabis for two to three weeks and had not told the appellant about it.

The appellant did not give evidence, but there was evidence before the magistrate of a video-taped interview of the appellant by investigating police officers, in which she admitted she shared the bedroom with Boland but denied knowing of the cannabis.

There was no dispute before his Worship that the cannabis was found in the course of the search of the flat, nor was it in dispute that if the drug were found to have been in the appellant's possession that that possession would have been unlawful. The sole issue was whether it had been established that the appellant was in possession of the drug at the time and place alleged.

Early in the hearing the prosecuting officer said that one of the evidentiary provisions of the *Drugs Misuse Act*, s.57(c), would be relied on, and his Worship later said that that provision was "the relevant and material matter":

"**57.** In respect of a charge against a person of having committed an offence defined in part 2–

. . . .

(c)proof that a dangerous drug was at the material time in or on a place of which that person was the occupier or concerned in the management or control of is conclusive evidence that the drug was then in the person's possession unless the person shows that he or she then neither knew nor had reason to suspect that the drug was in or on that place;"

His Worship observed that it was not in dispute that the appellant was an occupier or concerned in the management or control of the flat at the material time. Then, as s.57(c) required if it applied to this case, he turned his attention to the question of the appellant's state of mind, i.e., whether she had shown that she then neither knew nor had reason to suspect that the drug was in the flat.

His Worship found that the appellant had shown that she did not know that the drug was there. Following the announcement of that finding - which was based, as his Worship explained, on acceptance of the appellant's denial of knowledge of the drug in the recorded interview and on an inference from Boland's evidence, which it appears was accepted on this matter - there was a brief discussion with Mr Mawson, for the appellant, concerning the correct test to be applied when considering the appellant's state of mind. The outcome of that discussion is the origin of the appellant's third ground of appeal.

His Worship then announced that he was not satisfied that the appellant had proved on the balance of probabilities that she had no reason to suspect that the drug was in the flat. In explaining that finding he referred to the absence of any direct evidence of the appellant's state of mind on that issue: she did not give evidence and, although in the recorded interview she had said she did not know the drug was in the flat, she did not say that she had no reason to suspect it was there. His Worship said that an inference to that effect might have been open on Boland's evidence, but declined to draw the inference. The case for the complainant was conducted, and his Worship's findings proceeded, on the assumption that Boland was the actual possessor of the cannabis. The case alleged against the appellant, and accepted by the magistrate, was that the appellant, though not in actual possession of the drug, was caught by s.57(c).

On the hearing of the appeal Mr Hamlyn-Harris, for the appellant, advanced, without objection from Mr Martin for the respondent, an argument in support of the first and second grounds of appeal which he conceded had more substance than the third ground. In essence the submission was that on the facts of the case as his Worship found them to be s.57(c) had no application. It follows, if that proposition is correct, that any error made in dealing with the issue upon which the appellant failed would not be material to the outcome of the appeal.

When a charge is brought under s.9 of the *Drugs Misuse Act* the complainant may or may not seek to rely on s.57(c). If no reliance is placed on s.57(c) the mental element which is a necessary ingredient under the general law must be proved: *R v. Nguyen and Truong* [1995] 2 Qd.R. 285, at p.286 per Macrossan C.J. In such a case it must be proved that the accused person knew he or she had the relevant substance in his or her possession, although it need not be proved that he or she knew it to be a drug: *R v. Clare* [1994] 2 Qd.R. 619 and *R v. Nguyen and Truong* at p.288 per Pincus J.A. and at pp.291-292 and 295 per Ambrose J. In this case his Worship was, however, satisfied on the balance of probabilities that the appellant did not know that the drug was in the place in question, and, as I have mentioned, the case was conducted on behalf of the complainant and decided on the assumption that s.57(c) applied and no reliance was placed on the general law.

The operation of s.57(c) is "not such as to impute knowledge of any relevant fact to a person who is, by operation of the provision only, deemed to have a drug in his or her possession": *R v. Sargent* [1994] 1 Qd.R. 655, as explained by Pincus J.A. in *R v. Nguyen and Truong* at p.288. To the same effect are observations in *R v. Nguyen and Truong* by Macrossan C.J. that ". . the Court in *Sargent* did not consider that the statutory conclusion of possession by virtue of the subsection involved also a statutory attribution of actual knowledge to the offender in question. Rather it bypassed the need for the prosecution to prove and the court to find that the offender had knowledge of the existence of the thing in question and an intention concerning the control of it" (p.286). It should be noted that Fitzgerald P. and Cullinane J. expressed some reservations concerning the conclusion in *R v. Sargent* in *Symes v. Lawler* [1995] 1 Qd.R. 226, but since *R v. Nguyen and Truong* it may be accepted I think that the question has been resolved in favour of the proposition I have attributed to *R v. Sargent*.

The application of s.57(c) is "related to circumstances in which no person has physical custody or control of a drug which is simply `in or on', a `place'.": *Symes v. Lawler* at p.228 per Fitzgerald P. and Cullinane J. In *Lawler v. Prideaux* [1995] 1 Qd.R. 186, a case in which a dangerous drug was found on the person of a man in a flat of which the appellant was the occupier or concerned with the management and control, Macrossan C.J., after discussing the

effect of s.23 of the *Criminal Code*, continued:

". . . it should be accepted as sufficiently clear that the intended operation of s.57(c) of the *Drugs Misuse Act* is confined to cases where there is no immediate relationship of physical possession demonstrated by a person in proximity to the item, that is where there is no immediately obvious possessor, and the legislature has thought it necessary or desirable to attribute possession to someone.

For this purpose it selects the occupier or controller of the place where the item is found. Yet it is not to be accepted that the legislature has intended to construct a new offence in the case of occupiers (although not non-occupiers) who without complicity are simply aware of the location of drugs in the possession of another person. Further, it is a more natural meaning of the words `in or on a place of which (a person) was the occupier or concerned in the management or control of' to say that they do not extend to the case where the item is in the hand or pockets of another person who is the owner and possessor." (p.187)

In the same case Cullinane J., referring to s.57(c), said:

"The provision effects a statutory possession of drugs in an occupier of or persons concerned in the control and management of the premises. It should not, in my view, be construed as doing so where some other person is in actual possession of such drugs. The provision might be said to proceed from an assumption that no one is in possession in fact of the drug and fixes the person or persons with the relevant connection with the premises with possession" (p.189).

The reasons for accepting that construction of the provision and rejecting the wider literal construction upon which the magistrate appears to have acted in this case are discussed by Macrossan C.J. in *Lawler v. Prideaux* at p.187 and by Fitzgerald P. and Cullinane J. in *Symes v. Lawler* at pp.227-228.

It follows from that construction of s.57(c) that it had no application to this case because his Worship accepted that Boland had actual possession of the drug. Furthermore, Boland was, on the view of the facts acted upon by his Worship, the sole possessor of the drug. The only other possible possessor was the appellant whose complicity was excluded by her ignorance of its presence. Since the appellant was not in actual possession of the drug, and since she could not be caught by s.57(c) she should have been acquitted of the charge of unlawful possession. The appeal must therefore be allowed and the conviction of unlawful possession of a dangerous drug set aside. It is not necessary to consider the appellant's third ground of appeal.

As I have related, one fine of $600.00 was imposed for the two offences of which the

appellant was convicted. It appears that the magistrate attributed to $300.00 to each offence as happened when Boland was dealt with by another magistrate. I should therefore set aside the fine of $600 and the sentence of imprisonment for twenty days on default and substitute a fine of $300.00 and a sentence of imprisonment for ten days on default for the offence under s.10 of the *Drugs Misuse Act*. Four months for the payment of the fine were allowed and I should not alter that part of the order. I should add that it is not at all clear to me how it could be said that the appellant had the cigarette rolling machine in her possession *unlawfully*, but since her conviction under s.10 is not a matter for our consideration I shall go no further than recording my query on the element of unlawfulness.